(26)

No. 84-325

In the Supreme Court of the United States

OCTOBER TERM, 1984

METROPOLITAN LIFE INSURANCE COMPANY, APPELLANT

v.

COMMONWEALTH OF MASSACHUSETTS

ON APPEAL FROM THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS

REPLY BRIEF FOR APPELLANT

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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REPLY BRIEF FOR APPELLANT

As the Commonwealth concedes, its construction of the insurance savings clause would enable states to dictate the entire benefit package to be provided by insured ERISA plans. In pressing this extreme position, appellee has downplayed ERISA's broad preemption clause, misinterpreted the statute's legislative history, misread this Court's decisions in *Alessi* and *Shaw*, and mischaracterized Section 47B. We consider each of these deficiencies in turn.

I. NEITHER THE LANGUAGE OF THE PREEMPTION AND SAVINGS CLAUSES NOR THE LEGISLATIVE HISTORY OF ERISA SUPPORTS APPELLEE'S POSITION

Appellee begins by acknowledging that ERISA's preemption clause and the insurance savings clause "must be read together to give the entire statute meaning" (Br. 14).[1] It then proceeds, however, to ignore its own admonition and to treat this case as if it could be resolved by reference to the savings clause alone. But the meaning of that clause can only be understood in the statutory context in which it is found.

A. The Statutory Language

Appellee asserts that Congress historically has left insurance regulation to the states and that in enacting ERISA Congress "made a conscious policy decision to allow the states to continue to regulate insurance" (Br. 10; see also *id.* at 12, 13, 15-17). As if mere recitation of the language of the savings clause were dispositive, appellee stresses that the statutory text "makes it clear that no intent to preempt state insurance laws exists" (Br. 14). But all this merely begs the question to be decided. The issue is not whether Congress sought to preserve state regulation of insurance but how the savings clause, which expresses that intent, should be read together with ERISA's broad preemption clause, which

[1] "Br." refers to the Brief for Appellee in this Court.

clearly reflects a congressional decision not to cede regulation of ERISA plans to the states.

Appellee's contention that its position is supported by the "plain meaning" of the savings clause is incorrect. Even if the clause were read in a vacuum, it would not be at all "plain" that it covers Section 47B. The state law was intended not to regulate insurance but to improve access to private mental health care and thus to relieve the Commonwealth from "the financial burden of solving mental health problems" (Br. 6). As accurately described in the Commonwealth's brief, Section 47B "implements a broad public policy with respect to treatment of mental illness * * *;" its purpose is "to improve the perceived inadequacies of [that] treatment" (Br. 37). Moreover, mandated benefit statutes, such as Section 47B, did not even exist in 1970, when the savings clause first appeared in bill form. See Metropolitan Br. 37. There is nothing "plain" about the savings clause's applicability to such state laws.

In any event, one portion of a single subsection of a comprehensive federal statute should not be read in a vacuum. This Court has often held that arguments based on the purported meaning of a few statutory words viewed in isolation must not be permitted to overcome the policy and purpose of an entire act. See, *e.g.*, *United States* v. *American Trucking Associations*, 310 U.S. 534, 543-544 (1940); *Ozawa* v. *United States*, 260 U.S. 178, 194 (1922); *Holy Trinity Church* v. *United States*, 143 U.S. 457, 459 (1892). Here, appellee would have the Court focus on a single word, "insurance." With total disregard for what Congress sought to accomplish in ERISA, appellee would define that word in a way that defeats the legislative purpose.

Appellee's effort to rely on the language of ERISA's "deemer clause" is similarly flawed. Appellee says that Congress enacted the deemer clause because it recognizd that the savings clause is "extremely broad"—so broad that in the absence of the deemer clause it would "swallow up the rule of general preemption and allow the states to

directly regulate employee benefit plans" (Br. 16). Appellee then argues that the deemer clause is the only explicit limitation on the savings clause and that, while it forbids direct regulation of ERISA plans, it permits states to achieve the same results indirectly, by prescribing the content of insurance policies.

Appellee thus suggests that in enacting ERISA Congress employed a highly peculiar and self-defeating method of legislative drafting—first preempting state regulation, then adopting an exception that would swallow the rule, and then adopting a further qualification that would permit the rule to be overcome indirectly but not directly. This extraordinary construction is not supported by any legislative history or by any argument concerning statutory purpose. Much more plausible is appellants' straightforward position: Congress intended broadly to preempt state regulation of ERISA plans, it never conceived that state regulation of insurance practices would interfere with that purpose, and it enacted the deemer clause just to make certain that states would not attempt to treat ERISA plans as insurers and thus circumvent the broad preemption scheme.

B. ERISA's Pre-enactment Legislative History

As previously noted (Metropolitan Br. 13-15), the single most important piece of legislative history relevant to this case is the 1974 Conference Committee decision to replace earlier, narrower versions of ERISA's preemption provision with the unusually broad provision now found in Section 514(a) of the Act. As Representative Dent explained, Congress sought "to foreclose any non-Federal regulation of employee benefit plans." 120 Cong. Rec. 29197 (1974).

Appellee now offers three responses to this legislative history. First, appellee says that if ERISA's broad preemption provision were construed in accordance with Representative Dent's remarks, it would render the savings clause meaningless (Br. 21-22; see also *id.* at 20). That is not so. A great many state laws, including laws that

regulate insurance, banking, or securities, "relate to" ERISA plans within the meaning of Section 514(a). As this Court has held, the words "relate to" are to be construed in their broad sense, to include any state law that "has a connection with or reference to" an ERISA plan. *Shaw* v. *Delta Air Lines*, 103 S.Ct. 2890, 2900 (1933). Numerous state laws that genuinely regulate insurance also "relate to" ERISA plans in this broad sense and are protected from preemption by the savings clause. See Metropolitan Br. 34-36.

That does not mean, however, that the savings clause allows "non-Federal regulation" of ERISA plans, in the sense that Representative Dent used the phrase. Congress did not view the savings clause as a subterfuge by which states could regulate ERISA plans. It viewed the clause simply as a means of preserving traditional forms of state regulation in the areas of insurance, banking, and securities—regulation that might have some peripheral impact on ERISA plans (and thus fall within the scope of Section 514(a)) but that would not interfere with the congressional purpose of leaving the substantive content of such plans to private determination. Appellants' construction of the preemption and savings clauses thus accords with congressional intent and at the same time gives vitality to both stat tory provisions.

Appellee's second response to the Conference Committee's broadening of ERISA's preemption provision is that it did not "narrow[] or obviate[]" the savings clause (Br. 24; see also *id.* at 21). But, of course, appellants have never contended that it did. Indeed, appellants expressly noted (Metropolitan Br. 37) that, from 1970 on, the savings clause was included, in virtually identical form, in all of ERISA's predecessor bills. The important point is not the constancy of the clause's language but the fact that it must be read together with the preemption provision that it qualifies.

Before the preemption clause was broadened, it did not cover Section 47B, because Section 47B did not relate to any of the specific subjects that were to be regulated by

ERISA. Accordingly, before the Conference Committee's action, there would have been no need to determine whether Section 47B is a state law that regulates insurance within the meaning of the savings clause. The statute would not have been preempted in any event. That is why the breadth of ERISA's preemption provision is highly relevant. By including all state laws that relate to ERISA plans, Congress made it necessary to construe the savings clause in a way that would not defeat Congress' broad preemptive purpose.

Third, appellee seeks to restrict the significance of ERISA's broad preemption provision by referring to one example of potential state interference with ERISA plans that specifically attracted Congress' attention in 1974 (Br. 22-23). Congress was concerned that states not attempt to regulate the legal services an ERISA plan may provide.[2] Senator Williams and Representative Dent merely used such potential state regulation as an example of the kind of state control that would be precluded by ERISA's broad preemption clause. The example illustrates the breadth of the preemption; it does not narrow it.[3]

C. ERISA's Post-enactment Legislative History

Appellee attempts to derive support from two pieces of post-enactment legislative history (Br. 24-27).[4] The

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[2] Prepaid legal services are one of the benefits that an ERISA plan may provide. They are mentioned explicitly in the definition of "employee welfare benefit plan" in Section 3(1) of the Act, 29 U.S.C. 1002(1).

[3] If appellee were to prevail here, the states could use so-called "insurance" laws to regulate the prepaid legal services provided by insured ERISA plans—precisely the kind of regulation that Congress sought to prohibit.

[4] This Court has held that subsequent legislative developments are of minimal value (at most) in statutory interpretation. "[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one," particularly when the subsequent legislative events involve something less than enactment of a statute. *United States* v. *Price*, 361 U.S. 304, 313 (1960). See also

first is an oversight report prepared by Representative Dent's Subcommittee on Labor Standards during the Congress after ERISA was enacted. Activity Report of the House Comm. on Education and Labor, H.R. Rep. No. 1785, 94th Cong., 2d Sess. (1977). Appellee has misused the report, quoting an excerpt that has no bearing on the present case and failing to quote the material that does illumine the reasons for ERISA's broad preemption provision.

The passage on which appellee seeks to rely (Br. 25) only concerns entrepreneurs who functioned as insurers but sought to insulate themselves from state regulation by calling their enterprises ERISA plans.[5] The oversight committee merely endorsed the obvious conclusion that ERISA does not permit such an abuse. Contrary to appellee's assertion (Br. 25), the report says nothing about state regulation of insurance products purchased by ERISA plans.

The oversight report does provide useful insight into the rationale of ERISA's preemption provision. In an extended discussion, most of which is reproduced in the amicus brief of the AFL-CIO (at 21-23), Representative Dent's subcommittee explained that Congress acted "deliberately to preclude state authority over [ERISA] plans" and "to insure uniformity of regulation with respect to their activities." H.R. Rep. No. 1785, *supra*, at 46. The congressional policy was "the creation of uniform national standards," and the exceptions to preemption were not intended to detract from that goal. Rather, they were "designed to save state law as it is applied to entities which are not employee benefit plans * * *, to the extent that such regulation does not relate to employee benefit plans." *Ibid.* ERISA plans "needed to be freed of the possibility of state regulation," but at the same

Consumer Product Safety Commission v. *GTE Sylvania, Inc.*, 447 U.S. 102, 118 n.13 (1980); *Southeastern Community College* v. *Davis*, 442 U.S. 397, 411 n.11 (1979).

[5] The abusive practice is described in detail in *Bell* v. *Employee Security Benefit Association*, 437 F. Supp. 382 (D. Kan. 1977).

time Congress sought "to avoid disrupting state efforts to regulate the conduct of other financial entities not subject to the federal Act." *Ibid.* Summarizing its conclusions, the subcommittee stated (*id.* at 47):

> Based on our examination of the effects of section 514, it is our judgment that the legislative scheme of ERISA is sufficiently broad to leave no room for effective state regulation within the field preempted. Similarly it is our belief that the Federal interest and the need for national uniformity are so great that enforcement of state regulation should be precluded.

The oversight report thus reaffirms that ERISA's preemption provision was intended to enable employers to maintain uniform multistate ERISA plans and that the narrow exceptions to preemption were not intended to reinstate the very state authority that Congress sought to preclude.

The second piece of post-enactment history on which appellee relies is a proposed 1979 amendment to ERISA's savings clause. S. 209, 96th Cong., 1st Sess. § 155 (1979), reprinted in 125 Cong. Rec. 933, 937 (1979). The unenacted amendment would have overruled *Wadsworth* v. *Whaland*, 562 F.2d 70 (1st Cir. 1977), cert. denied, 435 U.S. 980 (1978), and made clear that mandated benefits statutes are not laws that regulate insurance within the meaning of ERISA. Appellee's reliance on this bill is misplaced.

As this Court has frequently held, unsuccessful amendments are unreliable guides to statutory interpretation. "Logically, several equally tenable inferences could be drawn from the failure of the Congress to adopt an amendment in light of the interpretation placed upon the existing law by some of its members, including the inference that the existing legislation already incorporated the offered change." *United States* v. *Wise*, 370 U.S. 405, 411 (1962).[6] The ambiguity is particularly great when

[6] See also, in addition to the cases cited in *Wise*, *United States* v. *W.M. Webb, Inc.*, 397 U.S. 179, 194 n.21 (1970); *Commissioner* v.

an amendment is introduced in response to a judicial decision that has reached a contrary result. In that situation, the proposed amendment may well be intended to correct the court and not the statute.

If the introduction of a proposed amendment were to be interpreted as an acknowledgment that the existing statute, properly interpreted, leads to the opposite result, members of Congress, the Executive Branch, and the public would be discouraged from seeking to clarify disputed statutory points. See *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 47 (1950), in which this Court rejected an argument very much like the one advanced here by appellee.

In short, the unsuccessful 1979 amendment leaves this controversy precisely where it would have been had the amendment not been introduced.

II. APPELLEE MISREADS THIS COURT'S DECISIONS IN *SHAW* AND *ALESSI*

The principal relevant teaching of *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981), is that state regulation of ERISA plans is preempted whether the regulation is direct or indirect. The principal relevant teaching of *Shaw* v. *Delta Air Lines*, 103 S.Ct. 2890 (1983), is that ERISA preemption does not require a conflict between state law and the federal statute. Both of these holdings are ignored in appellee's brief. Instead, appellee cites *Alessi* and *Shaw* for several propositions that the cases either do not support or flatly contradict.

First, appellee says that *Alessi* and *Shaw* both confirm a presumption against ERISA preemption (Br. 17). That is not correct. *Alessi* recites the general rule that preemption is disfavored in the absence of a clear statement from Congress, but it holds that Section 514(a) is just such an "explicit congressional statement." 451 U.S. at 522-523. *Shaw* does not say anything at all about a

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Engle, 104 S. Ct. 597, 607 n.21 (1984); *Order of Railway Conductors* v. *Swan*, 329 U.S. 520, 529 (1947); *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 n.11 (1969).

presumption against preemption. It simply holds that the language of Section 514(a) is unusually broad and reflects the congressional intent to foreclose state regulation. 103 S.Ct. 2899-2901.

Second, appellee tries to blunt the impact of *Alessi* by arguing that the New Jersey law at issue there was held to be preempted because it prohibited a practice that "ERISA explicitly permits" (Br. 17). Once again, appellee's statement is inaccurate. As this Court noted, "ERISA does not mention integration with workers' compensation, and the legislative history is equally silent on this point." 451 U.S. at 517.

Third, appellee contends (Br. 19) that *Shaw* "strongly intimated" that the Commonwealth's reading of the savings clause is correct. Appellee says that this Court "compared and contrasted the extremely broad scope of § 514(b), the savings clause * * *, with the narrow exemption worked by § 514(d)," the subsection at issue in *Shaw*. This statement is completely false. Section 514(b) is mentioned exactly once on the pages of the *Shaw* opinion cited by the Commonwealth. 103 S. Ct. at 2903-2904 (cited in Br. 19). This is the full sentence: "Sections 4(b)(3) and 514(b), which list specific exceptions, do not refer to state fair employment laws." 103 S.Ct. at 2903. That is all. There is no suggestion that the preemption exception in Section 514(b) is "extremely broad" or is broader than the one in Section 514(d). On the contrary, the sentences before and after the sentence just quoted make clear that the Court considered *all* the exceptions to ERISA preemption to be narrow. In the Court's words, "Congress * * * creat[ed] only very limited exceptions to pre-emption." 103 S.Ct. at 2903. Congress combined "enactment of an all-inclusive pre-emption provision" with "enumeration of narrow, specific exceptions to that provision." *Id.* The context thus makes clear that Section 514(b) is one of the "narrow, specific exceptions."

Fourth, referring to *Shaw*'s treatment of the New York Disability Benefits Law, appellee asserts (Br. 19) that "the Court noted its approval of a statutory scheme that would indirectly dictate the contents of an ERISA plan

and thereby detract from the uniformity of multi-state benefit plans." Once more, the Commonwealth is wrong. *Shaw* expressly held that states may *not* compel ERISA plans to contain certain disability benefits. 103 S.Ct. at 2906 ("the States may not require an employer to alter its ERISA plan"). At most, states may require employers to maintain separate plans solely for the purpose of complying with state disability insurance laws. Under Section 4(b)(3) of ERISA, 29 U.S.C. 1003(b)(3), such separate plans are not ERISA plans at all; ERISA simply does not apply to them. By refusing to permit states to compel employers to include disability benefits in their ERISA plans, *Shaw* sought to ensure that the variation among state disability benefits laws would not preclude multistate employers from maintaining a uniform ERISA plan.[7]

Doubtless as the result of its failure to appreciate the significance of *Alessi* and *Shaw*, the Commonwealth relies heavily (Br. 20-21, 26, 32) on the federal government's submission in *Wadsworth* v. *Whaland*, 562 F.2d 70 (1st Cir. 1977), cert. denied, 435 U.S. 980 (1978) (Nos. 77-765 and 77-772). The government's seven-year-old memorandum, which was prepared before *Alessi* and *Shaw* were decided, reflects neither the breadth of ERISA's preemption clause nor the congressional purposes that underlie the statutory scheme.

Given the changes in circumstances and the government's failure to file a brief in this case, no inference can be drawn concerning the government's position, and its earlier brief should not be treated as one filed now. If

[7] The Commonwealth therefore is wrong in asserting (Br. 33) that differences among state workers' compensation laws and disability laws prevent uniformity of multistate ERISA plans. Section 4(b)(3) of ERISA shows that when Congress wished to permit state prescription of benefits, it did so expressly, outside the scope of ERISA, in a manner designed not to interfere with employers' and employees' statutory right to a uniform ERISA plan. Section 4(b)(3) expressly refers to both workers' compensation laws and disability laws, but it has nothing to do with health benefit statutes like Section 47B.

inferences are to be drawn from the government's silence here, following its participation in *Wadsworth*, *Alessi*, and *Shaw*, appellants suggest that the proper inference is that the government views the matter differently today than it did in *Wadsworth*, but would rather not bear the burden of changing its earlier position.

III. THE McCARRAN-FERGUSON ACT DOES NOT ASSIST IN THE INTERPRETATION OF THE SAVINGS CLAUSE AND IN ANY EVENT DOES NOT SUPPORT APPELLEE'S POSITION

Several amici—but not the Commonwealth—argue that ERISA's savings clause should be construed in pari materia with the McCarran-Ferguson Act's references to "the business of insurance." Br. for American Psychological Assn., et al. 14-22; Br. for American Psychiatric Assn., et al. 7-20. Plucking isolated bits of language from decisions dealing with unrelated subjects, they further contend that, if the savings clause is so construed, it protects Section 47B from preemption.[8] Amici are wrong on both counts.[9]

[8] Amici rely primarily on three cases, two of which deal with the McCarran-Ferguson Act's antitrust exemption for "the business of insurance." *Union Labor Life Insurance Co.* v. *Pireno*, 458 U.S. 119 (1982); *Group Life & Health Insurance Co.* v. *Royal Drug Co.*, 440 U.S. 205 (1979). The third concerns the question whether a merger of two insurance companies, approved by the state insurance commissioner, is covered by the federal securities laws. *SEC* v. *National Securities, Inc.*, 393 U.S. 453 (1969). In all three, the conduct in question was held not to be "the business of insurance."

[9] One amicus brief makes the further contention that ERISA is not a law that "specifically relates to the business of insurance" under Section 2(b) of the McCarran-Ferguson Act, 15 U.S.C. 1012(b), and that therefore the Act prohibits ERISA from being construed "to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance * * *." Br. for American Psychological Assn., et al. 20-21 & n.24. This argument—which the Commonwealth does not make—has already been rejected by two federal courts of appeals, and we know of no contrary decisions. *Hewlett-Packard Co.* v. *Barnes*, 571 F.2d 502, 505 (9th Cir.), cert. denied, 439 U.S. 831 (1978); *Spirt* v. *Teachers Insurance and Annuity Association*, 691 F.2d 1054, 1065

A. Neither reason nor evidence suggests that ERISA and the McCarran-Ferguson Act should be construed in pari materia

The McCarran-Ferguson Act was enacted in 1945, nearly 30 years before ERISA. Its sole focus was insurance. As this Court has explained, the Act was a reaction to the decision in *United States* v. *South-Eastern Underwriters Association*, 322 U.S. 533 (1944), which held that an insurance contract is a transaction in commerce and that insurance companies doing business across state lines are thus subject to federal law. *South-Eastern Underwriters* reversed the 75-year-old decision in *Paul* v. *Virginia*, 75 U.S. (8 Wall.) 168 (1869), which had held that "[i]ssuing a policy of insurance is not a transaction of commerce" (*id.* at 183) and that therefore state laws regulating insurance were not preempted by the Commerce Clause. See *SEC* v. *National Securities, Inc.*, 393 U.S. 453, 458 (1969).

Justice Black's opinion for the Court in *South-Eastern Underwriters* summarized the origin and history of state regulation of insurance, and the practical basis of the decision in *Paul*:

> As early as 1866 the insurance trade, though still in its infancy, was subject to widespread abuses. To meet the imperative need for correction of these abuses the various state legislatures, including that of Virginia, passed regulatory legislation. *Paul* v. *Virginia* upheld one of Virginia's statutes.

322 U.S. at 544-545 (footnotes omitted). At a time when no federal laws existed to regulate the insurance business, the rationale of *Paul* was applied to uphold numer-

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(2d Cir. 1982), vacated and remanded on other grounds, 103 S. Ct. 3565 (1983). The precedents are clearly correct. ERISA is replete with explicit references to insurance and insurers, not the least of which is the savings clause at issue in this case. See, *e.g.*, 29 U.S.C. 1002(1), (38); 1023(e). Indeed, if Congress had not believed that ERISA "specifically relates to the business of insurance," the savings clause would have been unnecessary; the McCarran-Ferguson Act itself would have precluded ERISA preemption of any state law enacted "for the purpose of regulating the business of insurance."

ous other state laws regulating insurance. *Id.* at 543-544 & n.18 (citing cases).

In 1944, however, the insurance companies in *South-Eastern Underwriters* sought to use *Paul*'s holding as a shield against a criminal antitrust prosecution under the Sherman Act. This Court rejected the effort and overruled *Paul*. That called into question the validity of the large body of state insurance regulation developed since *Paul*. Congress was concerned that state regulation of out-of-state insurers might be said to intrude on the exclusive federal authority to regulate the interstate business of insurance. *SEC* v. *National Securities, Inc.*, *supra*, 393 U.S. at 458. To avert this problem, Congress passed the McCarran-Ferguson Act. The statute's purpose was to preserve the existing regime of state insurance regulation and to delineate the applicability of certain federal statutes, including the antitrust laws, to the business of insurance.

ERISA's purposes were very different. Congress' primary focus was the regulation of employee welfare and pension plans. When Congress enacted the preemption and savings clauses, it sought to remove ERISA plan regulation from the reach of state law but to leave state regulation of insurance, banking, and securities otherwise unaffected. As Rep. Dent's subcommittee said in its oversight report, "the problem was to extract [ERISA] plans from the regulatory schemes in the several states without creating untoward side effects." H.R. Rep. No. 1785, *supra*, at 46.

There is no evidence whatever that in drafting the savings clause Congress focused on the language of the McCarran-Ferguson Act or on any of the cases interpreting the Act's references to "business of insurance." Nor is there any reason why Congress should have done so. ERISA and the McCarran-Ferguson Act were intended to serve different purposes, and there is no reason why the word "insurance" in one must be coterminous with the phrase "business of insurance" in the other. As Justice Holmes wrote for the Court in *Towne* v. *Eisner*, 245 U.S. 418, 425 (1918), "A word is not a crystal,

transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." Particularly in the absence of any evidence that Congress considered the McCarran-Ferguson Act, the Court should not assume that they must be construed in parallel. See *Perez* v. *Campbell*, 402 U.S. 637, 655 (1971).

This Court has interpreted the McCarran-Ferguson Act primarily in the context of the Act's antitrust exemption for the business of insurance. The Court itself has observed that interpretation of the Act in that context involves considerations different from those that would govern a case involving the Act's primary purpose—preserving the type of state regulation that was in place prior to *South-Eastern Underwriters. Group Life & Health Insurance Co.* v. *Royal Drug Co.*, 440 U.S. 205, 218 n.18 (1979). Such variation in the construction of a statutory reference to "insurance" is even more to be expected where, as here, a second—and much different—federal statute is involved. As one commentator has observed:

> Attempts have sometimes been made, in statutes and elsewhere, to formulate a general definition of insurance for use in determining the reach of these regulatory measures. The success of any such effort is bound to be limited because different regulatory measures are efforts to respond to needs of very different scope. Thus, as already noted, no single concept of insurance is universally useful as a tool of thought and communication about such problems.

R. Keeton, *Basic Text on Insurance Law* 9 (1971) (footnote omitted).

B. In Any Event, the McCarran-Ferguson Act and Cases Decided under that Statute Do Not Support Appellee's View of the Savings Clause

Even if one seeks to interpret the savings clause by reference to the McCarran-Ferguson Act, the conclusion remains that Section 47B is not protected from ERISA preemption. The state insurance laws that the McCarran-Ferguson Act sought to preserve were statutes intended

either to regulate the potentially abusive practices of insurance companies or to tax such companies' business. As the 1944-45 congressional debates show, Congress focused its attention on state regulation of ratemaking, licensing, commissions, solvency, and investments. 90 Cong. Rec. 6418-6419, 6531 (1944) (remarks of Rep. Allen and Rep. Satterfield); 91 Cong. Rec. 482-483 (1945) (remarks of Sen. Radcliffe).[10] All of these matters involve protection of the policyholder against abuses by the insurance company—just the type of state legislation that would be preserved under appellants' construction of the savings clause. Nowhere does the legislative history of the McCarran-Ferguson Act suggest any consideration of state mandated benefit laws. That is hardly surprising, since such laws were unknown at the time.[11]

The numerous state insurance laws reviewed by this Court during the years between *Paul* and *South-Eastern Underwriters* provide further evidence of the kind of regulation that Congress sought to preserve through the McCarran-Ferguson Act. Without exception, these laws involved state efforts to prevent abusive practices or to tax the business of insurance companies.[12] None of the statutes remotely resembled mandated benefits laws.

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[10] For example, Representative Allen stated, "the public interest lies primarily in the protection of the policyholders through the preservation of the financial soundness of the insurer." 90 Cong. Rec. 6419 (1944). See also *id.* at 6525 ("Forty-eight States have departments of insurance to regulate and control rates, investments, commissions, and the other details of the business for the benefit and protection of their citizens") (remarks of Rep. Hancock).

[11] By applying the label "mandated benefit statute" to any statute that deals in any way with the coverage of a health insurance policy, some amici have tried to dispute appellants' observation that no such statute appeared until 1971. Br. for the American Psychological Assn., et al. 8-11. Instead, amici contend, such statutes existed as early as 1949. Even under amici's broadened—and here irrelevant—definition of mandated benefit statutes, no such law existed until several years after the McCarran-Ferguson Act was passed. Thus, Congress could not have had such laws in mind in 1945.

[12] See, *e.g.*, *Ducat* v. *Chicago*, 77 U.S. (10 Wall.) 410 (1871) (agent licensing, capital stock and asset statements, premium tax,

In *SEC* v. *National Securities, Inc.*, 393 U.S. 453 (1969), this Court explicitly recognized that traditional state regulation of insurance focused on the cost and reliability of coverage and the fairness of insurance companies' treatment of policyholders. Protection of the policyholder from abuses by the insurer was the central feature of such laws. As the Court stated,

> [t]he McCarran-Ferguson Act was an attempt to turn back the clock, to assure that the activities of insurance companies in dealing with their policyholders would remain subject to state regulation. * * *
>
> Given this history, the language of the statute takes on a different coloration. * * * [W]hatever the exact scope of the statutory term, it is clear where the focus was—it was on the relationship between the insurance company and the policyholder. Statutes aimed at protecting or regulating this relationship, directly or indirectly, are laws regulating the business of insurance.

Id. at 459-460.

Mandated benefit statutes such as Section 47B are not "aimed at protecting or regulating th[e] relationship" between the insurance company and the policyholder. As appellee expressly acknowledges, Section 47B was enacted "to address the problem of treating mental illness in the Commonwealth" (Br. 2); it is Massachusetts' "solution to the mental health treatment problem" (Br. 4).[13] It is

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penalties, remedies); *Hooper* v. *California*, 155 U.S. 648 (1895) (bonding requirement); *New York Life Insurance Co.* v. *Cravens*, 178 U.S. 389 (1900) (nonforfeiture provision); *German Alliance Insurance Co.* v. *Lewis*, 233 U.S. 389 (1914) (public filing of rate schedules, restrictions on rate changes, commissioner's power to raise or lower rates, rate discrimination prohibition); *Bothwell* v. *Buckbee, Mears Co.*, 275 U.S. 274 (1927) (licensing, statement of financial condition, agent for service, deposit reserve).

[13] The Commonwealth's focus on *National Securities'* reference to "the type of policy which could be issued," 393 U.S. at 460, does not alter this conclusion. Before the McCarran-Ferguson Act was passed, some states required the use of standardized or uniform contracts. See, *e.g.*, *Hoopeston Canning Co.* v. *Cullen*, 318 U.S. 313

not an attempt to deal with abuses and excesses by an insurer with respect to its policyholder, and it is therefore not the kind of statute that Congress sought to preserve in the McCarran-Ferguson Act.[14]

Group Life and Health Insurance Company v. *Royal Drug Co.*, 440 U.S. 205 (1979), leads to the same conclusion. The case held that insurance company contracts with pharmacists, which concerned the price at which pharmacists would provide drugs to persons covered by health insurance policies, were not protected by the McCarran-Ferguson Act's antitrust exemption for the "business of insurance." In describing the "business of insurance," the Court focused on "the spreading and underwriting of a policy-holder's risk" and "the contract between the insurer and the insured." *Id.* at 211-217. Read in context, neither of these phrases includes the *insured's choice* of the risks for which it desires coverage. Rather, they concern the insurance company's handling of the risks that the insured asks it to assume. By enacting a law requiring insurers to offer certain protection, a state might act "for the purpose of regulating the business of insurance;" but, by requiring insureds to accept coverage they do not want—as appellee has done in Section 47B—a state acts for different social purposes, purposes that do not involve the business of insurance.

(1943) (fire insurance policy). These statutes were among those that Congress sought to preserve with the McCarran-Ferguson Act. See 90 Cong. Rec. 6535 (1944) (remarks of Rep. Gwynne); *id.* at A4406 (proposal of National Association of Insurance Commissioners). Standardization of forms is not the same thing as requiring that particular kinds of risks be covered.

[14] Throughout its brief, the Commonwealth misstates the terms of its own statute. Not only does appellee ignore the direct applicability of Section 47B to ERISA plans, but it also says repeatedly that Section 47B applies only to insurance policies issued or sold in Massachusetts (Br. 2, 4, 9, 11, 37, 39). In fact, the statute applies to all insurance policies, wherever issued, that cover residents of the Commonwealth. J.S. App. 87a-89a. It is precisely this "extra-territorial" effect of several mandated benefit statutes that poses a major problem for multistate employers seeking to maintain uniform ERISA plans.

IV. NONE OF APPELLEE'S REMAINING ARGUMENTS SUPPORTS STATE REGULATION OF THE BENEFITS PACKAGE PROVIDED BY INSURED ERISA PLANS

Appellee makes two additional arguments in support of its position that it may indirectly—yet totally—regulate the benefits package provided by an insured ERISA plan. Neither can withstand analysis.

A. The Commonwealth's Asserted Power to Regulate the Terms of Insurance Policies

The Commonwealth contends (Br. 29-30) that states have the power to "control the content of insurance policies" and that this Court has recognized as much. The Commonwealth also says that it has exercised that power, to dictate the terms of automobile insurance policies (Br. 31). Neither point is relevant to the question whether mandated benefit statutes are saved from ERISA preemption.

No one denies that, apart from ERISA, states have the power to control the terms of insurance policies issued within their borders. The question here is not one of power but of compatibility with the federal statutory scheme.

The Commonwealth's automobile insurance example is also inapposite. Automobile insurance is not among the benefits that can be offered by ERISA plans. See Section 3(1) of the Act, 29 U.S.C. 1002(1). Thus, state statutes dictating the terms of automobile insurance policies pose no threat to the autonomy of ERISA plans; they are simply irrelevant.

B. The Commonwealth's "Regulatory Vacuum Argument

Appellee and amici both contend that appellants' position will create a "regulatory vacuum" for the substantive benefits that must be provided by insurance policies sold to ERISA plans (Br. 29; Br. for American Psychiatric Assn., et al. 18-19). The point is easily answered. Until 1971, there were no mandated benefit statutes, so the "regulatory vacuum" that appellee fears was the

norm in all states.[15] Moreover, as appellants showed in their opening brief (Metropolitan Br. 27-29), Congress deliberately chose to leave the content of ERISA plans to private determination. That intent requires that insured plans remain free to buy policies that provide only the benefits they select. Otherwise, insured plans will be allowed only the degree of choice that state legislatures permit.

V. THE SELF-EVIDENT EFFECT OF MANDATED BENEFIT LAWS

Neither appellee nor any amicus has been able to overcome the self-evident proposition that mandated benefit statutes increase costs, impede uniformity, and tend to encourage self-insurance. See *Shaw* v. *Delta Air Lines*, *supra*, 103 S.Ct. at 2904 & n.25. Nor can anyone fairly dispute that this defeats the statutory purpose.[16]

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[15] As noted at pages 3-4 n.5 of our main brief and in briefs filed by several amici, various state statutes that did exist before 1970 affected certain benefits provided in health insurance policies. For example, "provider" statutes required that payments be made to a non-medical provider of a service (*e.g.*, a social worker) if they would be made to a medical provider (*e.g.*, a psychiatrist). For another example, "conversion" statutes defined an employee's rights when his employment status changed.

Neither the Commonwealth nor any amicus has disputed the statement in appellants' main brief (Metropolitan Br. 11, 37) that before 1970 there were no mandated benefit statutes, as we have defined the term: state laws that require coverage for a particular illness or condition. Since the differences among the various kinds of statutes are substantial, and since the savings clause has never before been construed by this Court, this Court's decision should not go beyond the narrow group of statutes here challenged by appellants.

[16] Some amici have suggested that there is a rationale that might have led Congress to treat insured and self-insured plans differently. Br. for American Psychiatric Assn., et al. 20 & n.8. They say that "businesses large enough to self-insure are likely to provide adequate health insurance without government regulation." Only one authority is cited for this proposition; it is a study prepared by one of the amici, and it does not support their assertion. More important, amici offer no evidence that Congress intended to distinguish between insured and self-insured plans. The statutory

The impact of statutes such as Section 47B is reflected in the identities of the amici supporting each side in this case. Appellants' position is supported by both employees and employers, the very groups that pay for and are intended to benefit from ERISA plans.[17] Not a single employee or employer group urges affirmance. The only amicus support for appellee comes from other states and from providers of health care, many of whose services mandated benefit laws seek to promote. That, we submit, is a telling lineup, particularly for a statute that the Commonwealth is trying to defend as a regulation of insurers for the benefit of the insured.

CONCLUSION

For all the foregoing reasons, as well as the reasons set forth in appellants' opening brief, the judgment of the Supreme Judicial Court should be reversed.

Respectfully submitted,

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February 19, 1985

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language shows that it did not. 29 U.S.C. 1002(1). Nor can amici rationalize imposing the added costs of mandated benefit statutes disproportionately on those ERISA plans least able to afford them, *i.e.*, smaller plans for which self-insurance is not a viable option.

[17] Among the amici supporting appellants are the AFL-CIO, the ERISA Industry Committee (a nonprofit association of more than one hundred corporations maintaining welfare benefit plans for their employees), several employee health and welfare funds, and the National Coordinating Committee for Multiemployer Plans.